No. 96-1884

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

Robert Allen, Robert Bailor, John Clarke, Denise Coker, Earl Ennis, Lawrence Freeman, Monte Gaunt (deceased), Rick Grabenstein, William Grub, Cliff Harding, Donald Johnson, Stephen Keane, Kenneth Krogh, Michael Lavelle, Larry Lindskog, Jack Neumiller, Andrew Pavlischak, Gerald Poindexter, Richard Poole, Sheldon Reeve, Nicolis Stanley, Robert VanLeuven, Ralph Weir, Jr. and Michael Yates,

Petitioners,

vs.

Gypsy Church of the Northwest, a voluntary association, by and through Grover Marks, Trustee; Grover and Marie Marks, husband and wife; Marguerite Marks; Marguerite Marks as Guardian ad Litem for Steven Marks; Robert and Polly Marks, husband and wife; Robert and Polly Marks as Guardian ad Litem for minor children: Richard Marks, Shirley Marks, Lisa Marks and Steve Marks; Larry and Laura Zeko, husband and wife, Larry and Laura Zeko as Guardians ad Litem for minor children; Robert Zeko, Jason Zeko, Crissie Zeko and Sonny Zeko; Pete Marks, a single man; Peter Marks as Guardian ad Litem of a minor; Buck Marks; James Senator Marks, II, and Jane Marks, husband and wife; Tommy Marks; David Marks; James Senator Marks, II, as guardian ad litem for minor children: Marie Marks, Michael Marks, and Sonny Marks; Linda Marks; and Tina Marks,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

The respondents are correctly identified in the caption except that Gregg R. Smith, Esq., of the Law Offices of Gregg R. Smith, and Terry E. Thomson, Esq., of Sternberg Thomson Okrent & Scher, PLLC, are counsel only for the plaintiffs in Eastern District of Washington Cause No. 89-425-AAM (hereinafter the "425 Respondents" or "425 Plaintiffs") including: Gypsy Church of the Northwest, Grover and Marie Marks; Marguerite Marks, individually and as guardian ad item for Steven Marks; Robert and Polly Marks, individually and as guardians ad litem for Richard Marks, Shirley Marks, Lisa Marks and Steve Marks; Larry and Laura Zeko, individually and as guardians ad litem for Robert Zeko, Jason Zeko, Crissie Zeko, and Sonny Zeko; and Pete Marks, individually and as guardian ad litem for Buck Marks.

Patrick K. Stiley, Esq., is counsel of record for the plaintiffs in Eastern District of Washington Cause No. 89-423-AAM (the "423 Plaintiffs"), including: James Senator Marks II and Jane Marks; Tommy Marks; David Marks; and James Senator Marks II, as guardian ad litem for Marie Marks, Michael Marks and Sonny Marks; Linda Marks; and, Tina Marks.

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The "425 plaintiffs/respondents", as defined above, request that the Court deny the petition for writ of certiorari seeking review of an opinion of the Ninth Circuit Court of Appeals. The Ninth Circuit opinion is reported at 102 F.3d 1012 (9th Cir. 1996), and is attached as Appendix A to the petitioners' Appendix. (For the convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix A to the petition.)

I. COUNTERSTATEMENT OF THE CASE

A. Introduction

Petitioner law enforcement officers (hereinafter the "officers") distort the record on appeal, allude to unsubstantiated facts outside the record, and ignore the well-established holdings in Ybarra v. Illinois, 444 U.S. 85 (1979), and its progeny, to challenge the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on December 19, 1996.

The officers seek review of the denial of qualified immunity, and summary judgment on the issue of liability, for their roles in securing and enforcing one or more general search warrants illegally authorizing the search of "any persons on the premises" of certain of the plaintiffs' homes (hereinafter the "all persons warrants"). (See Excerpts of Record in related proceedings before the United States Court of Appeals for the Ninth Circuit ("ER"), at ER 652)

The "all persons" warrants led to the search of more than 15 of the 425 and 423 plaintiffs, even though no officer can credibly argue, and no state or federal court has held to this date after 11 years of litigation, that probable cause existed for

the search of more than one (or possibly two) of the plaintiffs, or that any effort was made by the officers to ensure that the warrants were particularized as to each individual searched.

The officers further seek review of the Ninth Circuit's award of attorneys' fees to those plaintiffs who succeeded in (i) stripping the officers of qualified immunity for their "all persons" warrant, and (ii) securing summary judgment on the issue of liability against the officers who procured the warrant or wrongfully executed it.

In their Petition, the officers further ignore a primary allegation and issue in these Civil Rights cases, i.e. that the officers knowingly planned and executed a general search **hours before** the warrant in dispute was issued, and that the procurement of the warrant was pretextual only. The Ninth Circuit has held that this significant dispute over the time of the commencement of the search operation is inherently factual in nature, and that a trial on the merits is required before that issue and the officers' qualified immunity relating thereto can be adjudicated. (App. A, at App. 54)

B. Petitioners' Misstatements of Fact

Pursuant to United States Supreme Court Rule 15.1, respondents bring the following misstatements of facts contained in the Petition to the Court's attention.

The petitioners misrepresent and repeatedly imply to this Court that all 27 of the 423 and 425 Plaintiffs were being investigated for trafficking in stolen property, and that a sting operation conducted by a joint City/County task force was investigating all 27 plaintiffs. (Petition, at 4) Instead, the investigation, as described on page one of the affidavit of probable cause, under the heading "Crime being investigated,"

revolved around the activities of James Senator Marks II, aka "Sonny" Marks, a plaintiff in the 423 case who resided at 802 S. Thor, Spokane, Washington. (ER 602)

Most of the plaintiffs searched did not live at either Grover Marks' house at 428 S. Thor, or James Marks' house at 802 S. Thor. They were men, women and children unrelated to the investigation, who just happened to be relatives of Grover Marks and Marie Marks, and who were visiting them at their home at 428 S. Thor, Spokane, Washington, at the time of the search operation. (See Supplemental Excerpts of Record in related proceedings before the United States Court of Appeals for the Ninth Circuit ("SER"), at SER 2044-45)

The petitioners further misrepresent to this Court that their issuance of an "all persons" warrant on June 18, 1996 was an inadvertent mistake, and that the inclusion of language authorizing the search of "any persons on the premises" was innocently overlooked by the officers physically preparing the warrant. (Petition at 10, 20, 22-23, 24, and 25) The record shows that the City of Spokane Police Department, and the officers securing the general "all persons" warrant, were accustomed to securing warrants for premises which broadly (and illegally) authorized the search of "all persons" present on the premises. On June 18, 1986, the officers specifically planned and executed a general warrantless search of plaintiffs' homes and persons. (Appendix B ("App. B") at 1-3; App. B at 4-11; SER 1911a, 1911b, 1911c, 1913, 2487-2489) Hours before issuance of the search warrants, Detective Denise Coker was recruited to search the women and children present during the operation (App. B at 12-13, 16). She and other participating officers then attended a related pre-search briefing during the noon hour at the Spokane Police Department, where various supervisory officers gave general pre-search instructions broadly to search for "items taken in residential

home burglaries." (App. B at 14-15)

The warrants were obtained through the efforts of Detectives Neumiller and Reeve, and Deputy Sheriff Grabenstein. Detective Neumiller and Deputy Sheriff Grabenstein had taken the lead in the ongoing burglary task force investigation, and were appointed "case managers" for the search operations at 802 S. Thor and 428 S. Thor, respectively. Deputy Sheriff Grabenstein, who physically presented the warrant to the magistrate, admits that the officers intended to secure a general "all persons" warrant, even though that intent was not communicated to the magistrate. (App. B at 4-11)

Detective Neumiller, who worked with Deputy Grabenstein in gathering information for the warrant(s), participated in the noon hour briefing at the Spokane Police Department, during which general search instructions were provided to the search and security teams (again, hours before any warrants were issued). (App. B at 14-15)

Deputy Sheriff Grabenstein has further admitted that, in the course of securing the warrant(s), he and Detectives Neumiller and Reeve had no idea, and made no effort to identify the persons who might be on the premises at the time of the search operation, or whether probable cause existed to search all such persons. (App. B at 4-11)

Instead of the issuance of the general "all persons" warrants being inadvertent and a mere mistake (see Petition, at 10, 20, 22-23, 24 and 25), at all times prior to 1997 the officers claimed that the warrant was properly issued and probable cause somehow existed to search all persons on the premises of plaintiffs' homes. (See e.g., Appellants' Consolidated Brief before Ninth Circuit filed April 7, 1995, at pp. 36-37.) Even

existing City of Spokane Chief of Police Terrence Mangan contended, in an affidavit in support of summary judgment on the issue of qualified immunity, that everything was done pursuant to established City of Spokane Police Department policies and procedures - including presumably the arbitrary use of a premises warrant to search all persons on the premises at the time of the search. (SER 2158)

The petitioners further misrepresent to this Court that the officers did not commence a warrantless, general search around the noon hour (consistent with the noon hour briefing at the police station). (Petition at 11-12) Numerous third party witnesses, as well as plaintiffs, personally observed the officers' search activities hours before the warrants were issued on June 18, 1986. (See e.g., SER 1809-1810, 1855-74, 1941, 1943-1944, 1945-1946, 1964-1966, 1967-1968)

A Spokane, Washington attorney, Robert McGoldrick, personally observed search activities under way at James Marks' residence at 802 S. Thor around noon on June 18, 1986, and then witnessed firsthand the officers' evasive and deceptive acts to cover up their warrantless search. When attorney McGoldrick requested a copy of the warrant from the officers present at the 802 S. Thor home, the officers claimed they did not have one, but that McGoldrick could obtain one at Grover Marks' home at 428 S. Thor residence. When Mr. McGoldrick immediately drove to the 428 S. Thor residence to obtain a copy of the warrant, the officers at the 428 S. Thor residence denied him access to the residence or plaintiffs. (See SER 1855-1874)

Police videotechnician and appellant Lavelle videotaped the seizure of a watch from plaintiff Grover Marks' person, including videotaping the movement of the "second" hand on the watch and the time of day of 1:08, whereas the warrants

were issued at about 3:15 pm. (SER 1903; 1969) The time of 1:08 p.m. is consistent with the time plaintiffs have estimated the search activities commenced. (SER 1770-1782)

The petitioners further misrepresent to this Court that the officers only conducted "pat down" searches of plaintiffs found on the premises. (Petition, at 12) Detective Denise Coker has admitted to conducting "body searches" of the women and children (male and female) present at the 428 S. Thor residence at the time of the search. (App. B at 16) Her contemporaneous police report admits to conducting the "body searches" of the plaintiffs in the 423 and 425 cases. (App. B at 18) Detectives Coker and Krogh, and Deputy Sheriff Grabenstein, not only conducted searches of plaintiffs, they seized all valuable personal property items on the persons searched. Without making any effort to identify property items to the warrant(s), Detective Coker, for example: (i) removed bracelets from Marie Marks' wrists (SER 1774-1776, 1914a); (ii) removed jewelry from Laura Zeko's person (SER 1913); (iii) removed jewelry from Marguerite Marks' person (SER 1770-1772, 1913); (iv) removed hoop earrings from 6-year old Crissie Marks's ears (SER 1914a); (v) removed $11.00 in pocket money from Richard Marks (SER 2047); (vi) removed $9.00 in pocket money from Steve Marks (SER 2047); (vi) removed $7.00 in pocket money from Buck Marks (SER 2047); and, (vii) inspected the diaper, and removed a Gypsy good luck charm pinned to Steven Marks' diaper. (SER 1790, 1911b, 2047, 2259-2260)

Altogether, 14 of the 18 individual plaintiffs in the "425" case, and several of the individual plaintiffs in the companion "423" case, were subjected to searches and/or the seizure of property from their persons. (SER 1908a-1908b, 2491) The identity of the "425" plaintiffs searched, their ages at the time of the June 18, 1986 search, and an indication of

whether or not they were named in the warrant, are set forth below (see also SER 2044-2046):

Name of 425 Plaintiff Searched	Age	Named in Warrant
Grover Marks	Adult	Yes
Marie Marks	Adult	No
Marguerite Marks	Adult	No
Steve Marks	23 months	No
Bobby Marks	Adult	No
Richard Marks	11 years	No
Steve Marks	10 years	No
Laura Zeko	Adult	No
Chrissie Zeko	6 years	No
Robert Zeko	11 years	No
Jason Zeko	9 years	No
Sonny Zeko	7 months	No
Pete Marks	Adult	No
Buck Marks	6 years	No

The petitioners falsely indicate to this Court that, at the time of the search operation, they seized 200 items which they had identified as stolen. (Petition at 7) In contrast, Detective/Case Manager Grabenstein admits that he brought only one copy of the approximately 40-page warrant with him to 428 S. Thor, does not know what happened to it, did not refer to the warrant during the search operation at 428 S. Thor, did not consult with any one on the search team as to their search activities, was not approached by any one on the search team regarding what to search for or seize, and was not requested to review and did not review property items seized to the warrant before they were seized. (App. B at 4-11, 17) At the time of the seizure of over 400 items of property from 428 S. Thor, the officers failed to identify any of the jewelry seized

as coming within the terms of the warrant, other than certain silverware and rings sold for about $5.00 to Marie Marks the day before. (SER 1786-1787, 1790-1792, 1794, 1809-1810, 1913, and 2248)

Only more than a week later, when the officers broadly advertised and conducted a "public display" of the property items seized from plaintiffs, did numerous members of the public come forward and assert conflicting claims to various property items. (SER 1895, 1906, 2300, 2356) The conflicting claims of the plaintiffs and members of the public (sometimes more than one member of the public made claim to the same item of property) were later resolved by separate hearing, and involved the distinctly different issue of superior right to possession, not whether property had been "stolen".

Even defendants' own police tactics experts, i.e. (ii) Don Van Blaricom, former Chief of Police of the City of Bellevue, Washington and (ii) Leonard Territo, Ph.D., have admitted that without access to a warrant during the search operation, Case Manager Grabenstein, and the other officers involved in the search, could not have done a proper job of determining what and whom to search and whether to seize an item pursuant to the warrant. (SER 2286-88, 2291-2296, 2300-2301, 2303)

The petitioners further misrepresent to this Court that plaintiffs can only demonstrate the officers' liability for "technical constitutional issues," and that plaintiffs are not entitled to more than "nominal" or "very low" damages. (Petition, at 16-17) Men, women and children having nothing to do with the pending investigation had their persons and property subjected to an invasion of over 20 armed officers, who forcefully barged into the residences at 428 S. Thor and 802 S. Thor. (App. B at 1-3) These men, women and children were subjected to body searches, without just cause, had all of

their personal effects and cash seized from them, and were essentially held hostage in one room of the 428 S. Thor residence, or on the grounds of the residence, during a search operation that began around the noon hour and continued into the late afternoon and evening. (App. B at 1-3; SER 1918) Three additional individual 425 plaintiffs, i.e., Polly Marks and her two minor daughters, Shirley and Lisa, were essentially held hostage on the grounds of the home at 428 S. Thor during most of the search operation. (SER 2047)

The questionable "all persons" warrants, and conduct of the officers during the search, were more than a "mere constituted technicality." During the evening of June 18, 1986, Captain Allen, Lieutenant Freeman, Deputy Police Chief Harding, and Assistant City Attorney Treppiedi, among others, had an unusual meeting at the Spokane Police Department, and conversed by telephone with Deputy Prosecuting Attorney Pat Thompson. At that time, Mr. Treppiedi and Deputy Prosecuting Attorney Thompson reviewed with top-ranking members of the City of Spokane Police Department the search activities and the novel idea of "amending" the warrants after the fact, because of the breadth of the search operation. (SER 2208, 2210-2212)

The petitioners misrepresent to this Court that the 425 Plaintiffs' demands in this lawsuit exceed $40 or $59 million, in an effort to discredit and defer the Ninth Circuit's determination that they are entitled to an interim award of fees. (Petition, at 4, 13-14, and 17) The 425 complaint makes no dollar demand in its complaint, and merely attached a 1989 "Claim for Damages" which stated that the amount of the damages were "undetermined at this time" and were estimated only. (ER 27)

In an effort to undermine plaintiffs' right to fees, the petitioners further misrepresent to this Court that "practically

all" of plaintiffs' claims have been dismissed. (Petition, at 5) But plaintiffs' claims for constitutional torts, in violation of 42 U.S.C. Section 1983, has always been a central focus of the 425 plaintiffs' claims. Plaintiffs' claims to this effect, and the damages flowing therefrom, have not been materially affected by the court rulings to date. The court rulings, including the Ninth Circuit's December 19, 1996 opinion, as amended, have confirmed the continuing vitality of Ybarra v. Illinois, supra, and the invalidity of the "all persons" warrants in this case.

The petitioners further misrepresent to this Court that certain FRCP 68 offers of judgment preclude an award of fees. The offers of judgment are not part of the record, but nevertheless do not preclude plaintiffs' claim to an interim award of fees for prevailing on their claims against those individual officers involved in the procurement and execution of defendants' "all persons" warrants. Regardless, the Ninth Circuit opinion does not preclude the trial court's consideration of relevant facts or issues relating to the fee application, including the status of any pertinent Rule 68 offers of judgment.

The petitioners further misrepresent to this Court that the warrants in issue were secured under substantial time constraints and exigent circumstances, explaining (apparently) the alleged mistake in securing an "all persons warrant." Inconsistently, the officers have admitted that they had the homes at 428 S. Thor and 802 S. Thor under constant surveillance during the morning and afternoon of June 18, 1986; that they had "frozen" the homes prior to the commencement of the search, so that no one could enter or leave the premises; that it was customary for the officers to "freeze" premises to be searched; that they had more than twenty officers assigned to security and search teams for the search operation (see SER 2060-2061); that they claim they

gained access to the homes with the express consent of the plaintiffs (which the plaintiffs deny); and, that the officers claim they dutifully waited for hours inside the plaintiffs' homes until the warrants were signed at 3:15 p.m. and delivered at about 3:30 p.m. to the homes (which the plaintiffs also deny, and which petitioners' own videotape evidence refutes, showing the seizure of Grover Marks' watch at 1:08 p.m.).

II. THERE IS NO CONFLICT BETWEEN CIRCUIT COURTS ON RESPONDENTS' INTERIM FEE AWARD.

The petitioner officers are in error when they argue that the Ninth Circuit's interim award of fees conflicts with existing law, or the Fourth Circuit's holding in Farrar v. Hobby, 506 U.S. 103 (1992). The award of fees is premised solely on the fact that those persons illegally searched pursuant to the general "all persons" warrants clearly have prevailed on the merits. These plaintiffs have denied the officers' qualified immunity for their roles in procuring or executing such warrants, and have secured summary judgment on the issue of liability for such conduct. (Appendix A at App. 55)

Petitioners misrepresent that it is impossible to determine the degree of success obtained by respondents, when there is an enormous record before the district court, and the district court has considerable discretionary authority to review the record and pertinent factual issues relating to an interim fee application and award.

The officers' objection to the Ninth Circuit's award of attorneys' fees is not credible, given the controlling law of this Court and the Ninth Circuit, which is in accord with a proper

analysis of Farrar v. Hobby[1]. Morales v. City of San Rafael, 96 F.3d 359, 362 (9th Cir. 1996). Attorneys' fees, pursuant to 42 U.S.C. Section 1988, are properly awarded on appeal to a party who successfully defends the merits of the issues on appeal. Trevino v. Gates, 99 F.3d 911, 926 (9th Cir. 1996).

Petitioners seek to prevent the award of attorney's fees through an incorrect analysis of the Farrar case, and to define the right to fees as a function of the damages awarded, citing to McGinnis v. Kentucky Fried Chicken of California[2]. This flawed interpretation of Farrar would prevent the award of attorneys' fees in any interlocutory appeal, regardless of the success achieved, whereas a proper analysis indicates that attorneys' fees are to be awarded where the plaintiff has succeeded on any significant issue. Animal Lovers Volunteer Ass'n v. Carlucci, 867 F.2d 1224, 1225 (9th Cir. 1989).

Instructive is Texas State Teachers v. Garland Ind. Sch. Dist., 489 U.S. 782, 790 (1989):

> Our decision in Henley [461 U.S. 424 (1983)] is consistent with congressional intent in this regard. Congress clearly contemplated that interim fee awards would be available 'where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues.' S.Rep. No. 94-1011, p. 5 (1976); see also H.R. Rep. No. 94-1558, p. 8 (1976). U.S. Code Cong. & Admin.News 1976, pp. 5908, 5912. In

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[1]506 U.S. 103 (1992)

[2]51 F.3d 805, 809-810 (9th Cir. 1994)

> discussing the availability of fees pendente lite under Section 1988, we have indicated that such awards are proper where a party "has established his entitlement to some relief on the merits of his claims, either in trial or on appeal." Hanrahan v. Hampton, 446 U.S. 754, 757, 100 S.Ct. 1987, 1989, 64 L.Ed.2d 670 (1980).

In the context of a Section 1983 case, the success of a plaintiff is not necessarily measured by the money ultimately awarded to an individual plaintiff, but rather as a function of the issues litigated and the benefits obtained. An appropriate analysis of whether it is proper to award attorneys' fees pursuant to 42 U.S.C. Section 1988 is set forth in Morales v. City of San Rafael[3]:

> However, Farrar also stands for a more limited proposition, and it is in the application of this narrow second ruling that the district court erred in this case. In Farrar, the Supreme Court created an exception to the general rule governing a district court's calculation of attorneys' fees. The Court held that "nominal damages" cases in which the relief is de minimis are exempted from the general requirements that govern the calculation of attorney's fees including the requirement that a lodestar first be calculated. 506 U.S. at 116-18, 113 S.Ct. at 576 (O'Connor, J., concurring). The Farrar exception, which would allow the court to dispense with the calculation of a

[3]96 F.3d 359 (9th Cir. 1996)

> lodestar and simply establish a low fee or no fee at all, is limited to cases in which the civil rights plaintiff "prevailed" but received only nominal damages and achieved only "technical" success. (Footnotes omitted)

Id at 362-63 (emphasis added).

To determine whether the plaintiffs achieved more than "technical" success, other factors must be analyzed, which include the "significance of the legal issues" and the "public purpose" served by this litigation. Supra at 363. By sustaining many of the district court's rulings on the illegality of an "all persons" warrant, the plaintiffs have achieved success that entitles them to relief, not merely the right to proceed to trial. Regardless of the monetary outcome, substantial public benefit has accrued as well, including the discrediting and curtailment of those police tactics in clear violation of Constitutional guarantees.

Without limiting, or minimizing, each of the determinations in the Opinion, the petitioner officers were denied qualified immunity on two significant issues. First, those persons who were proximate to the execution of a search warrant at a "family home, where innocent family members or friends might be residing or visiting," and in which there is no individualized probable cause or other circumstances that would justify a search, will no longer be subject to petitioners' blanket search and seizure. (Appendix A, at App. 41-43) Secondly, a defective search warrant reviewed by a prosecutor and signed by a judge remains defective, "absent specific assurances from an impartial judge or magistrate...." (Appendix A, at App. 39-40, quoting U.S. v. Kow, 58 F.3d at 429). The Ninth Circuit has also affirmed summary judgment against those officers involved in procuring or executing the

search warrant.

As a result of these determinations, among others, the plaintiffs have secured far more than a technical victory, and are entitled to an award of attorneys' fees.

Petitioners disingenuously claim that the Ninth Circuit's opinion, awarding fees, has "created confusion and an injustice" (Petition at 17), when the only confusion and injustice come from petitioners' litigation tactics. Peti- tioners seek to cloud the issues on plaintiffs' right to fees by a distorted and inaccurate statement of facts, and then seek to impose such strict criteria for an award of fees that a district court would have no discretionary authority to award interim fees.

III. Ybarra v. Illinois Sets Forth Well-Established Constitutional Principles on the Search of Persons.

Petitioners have not stated a proper jurisdictional ground for challenging the Ninth Circuit's opinion that petitioners' general "all persons" warrant is patently overly broad and unconstitutional. Petitioners ignore the seminal holding in Ybarra v. Illinois, supra, and its progeny, which have clearly and unequivocally required that warrants be particularized as to each person to be searched. Petitioners ignore their own comment on page 5 of their Petition for Rehearing before the Ninth Circuit:

> The Appellants, and presumably law enforcement officers all across the country, understand and appreciate the clear holding in Ybarra v. Illinois, 444 U.S. 85 (1979).

Petitioners seek to cloud the issues by falsely claiming

that their "all persons" warrant was an innocent mistake, and that they should not be held strictly liable for "inadvertent mistakes". (Petition at 24) In truth, petitioners planned a general search of persons, recruited Detective Coker in the morning hours on June 18, 1986 for the search of women and children (none of whom is identified in the probable cause affidavit or warrants), gave general search instructions to the officers attending the pre-search briefing at the police station, and thereafter proceeded to conduct body searches on any persons on the premises of the home at 428 S. Thor. The searching officers made no attempt to gain access to a copy of the warrant, or to inquire about the contents of the warrant or authority to search all persons, or to inquire of Case Manager Grabenstein, who prepared the affidavit of probable cause and warrant, and was present during the search at 428 S. Thor.

If, as petitioners contend, the preparation of a general "all persons" warrant was a mistake or innocent oversight, why did the officers not stop at a pat down search for officer safety reasons? Why did the officers instead plan hours before the search began to search all plaintiffs present? Why did the officers intentionally conduct body searches of innocent men, women and children? Why did they seize all jewelry and personal property on plaintiffs' persons, without knowing whether or not they came within the scope of the warrants? Why was this "mistake" not disclosed by the officers during the past 11 years of litigation, instead of for the first time on appeal in the officers' motion for reconsideration before the Ninth Circuit, and now in their Petition for Writ of Certiorari to this Court?

IV. CONCLUSION

The writ of certiorari should be denied.

Dated this 25th day of June, 1997.

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Terry E. Thomson

Counsel for Respondents

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C. Pages 1 and 2 of "Affidavit of Denise Coker," filed April 3, 1990 in United States District Court, Eastern District of Washington, Cause No. C-89-425-RJM ..... App.B 12

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GYPSY CHURCH OF THE NORTHWEST, et al.,	)	NO. C89-425-RJM
Plaintiff,	)	
vs.	)	AFFIDAVIT OF MARIE MARKS
SPOKANE COUNTY, et al.,	)	
Defendant.	)	

My name is Marie Lippie Marks, and I am one of the Plaintiffs. I am over 70 years old, and I live at South 428 Thor in Spokane, Washington. I have lived there about 30 years.

On June 18, 1986, police officers (some with uniforms and some without uniforms) forced their way into my home before or during the Noon hour. When they came in, I was in the house with Marguerite, my daughter, and seven grandchildren. My husband, Grover, was not home. The police frightened me when they came in, and Marguerite tried to put her foot against the door, but they forced their way in. They went to the front of the house on Thor, opened the door, and let other police officers come in. They asked if anyone else was home, and then just started searching the house.

In my presence, my daughter Marguerite asked to see a paper or some permission for the police to be there. They said they had a warrant coming pretty soon. They were there for a long time (more than a hour) before my husband came home. Mr. Frank Costanzo, a business associate of my husband, stopped by earlier and then left. From the time the first police came, more police officers kept coming in bunches and searching every place in the house. Rose, another daughter of mine, had come into the house and fainted, and the police said they would call an ambulance.

The police continued to search everybody in the house. My sons, Pete Marks and Bobby Marks, arrived before my husband did. Whenever family members came in, the police took all the jewelry from their persons. I remember that they had money that they had found displayed on the bed, and were taking pictures of it. They were taking pictures of everything. They never showed us a warrant.

The police found religious artifacts and holy money, and they changed their minds 2 or 3 times before they decided to take the money also. The police officers were ripping the money out of the holy blanket while I was crying, and I begged them not to do that because of our religion. Other religious artifacts were taken from me and from the children in the house. Earrings were taken from the babies and from my girl grandchildren.

The police would not let anybody leave the house once they came in. They wouldn't let us speak our own language. My son, Bobby, kept asking for a warrant, and when he kept doing so, the police arrested him.

At one time, our attorney Robert McGoldrick was outside of the house, towards the alley, and I could see him, but the police would not let me go to him, and would not let him come into our house. It seemed like the police didn't care what they were doing as long as they could take all jewelry off anybody who was in the house.

The police made me go into a bedroom and take off my clothes, and I know that they did this to other women who were there.

It seemed like the police were there forever, but I know they were there for at least 6 or 7 hours, and they took all our property and religious artifacts and left. They were laughing when they were leaving, and making fun of what they were doing.

When the police first came they put up yellow tape around the house. The whole experience was terrible, and a nightmare in my life. I was afraid and fearful for my family and myself, and the way they treated me. To this day, there are items of jewelry that I had that have never been found, nor were they on any inventory paper that the police have. There is money that is missing from our house, and I know there was no paper ever given by the police to my husband or me when they left our home and went to the police station.

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Q. When you got to Grover's house that afternoon or whenever it was on June 18, '86 for the first time, did you provide any briefing to any of the members of the task force on the items, the specific items to be searched for?

A. No, I didn't.

****

Q. You only had one copy of the search warrant?

A. I only had one.

****

Q. (BY MR. THOMSON) Was there anyone else at Grover Marks' house to your knowledge during the search operation or prior to that had seen either the affidavit for the warrant or the warrant itself?

A. I don't believe so.

****

Q. Were you aware at the time that you were preparing the search warrant or the affidavit for search warrant of which specific individuals were at Grover Marks' house?

A. I was not.

Q. Were you aware that there were a number of persons that were within the house, whether visiting or there or some other reason?

A. I did not know exactly how many people were in the house.

Q. Did you make any effort prior to submitting the affidavit for search warrant to Judge Tanksley to identify any of the persons that might be in Grover's house at the time?

A. No, I didn't.

****

Q. You're not aware of either Detective Reeve or Neumiller or you making any
effort to determine who was present at the house at the time?

A. No.

Q. You mean that's a correct statement, none of the three of you made any such effort, correct?

A. No. Excuse me. That is correct, yes.

****

Q. And was that the intent and purpose of your reference in the search warrant itself to the search of all persons?

A. The search of all persons was both for that and the fact that any person might have had the opportunity to secrete any of these items listed for which we were searching on their person.

Q. The affidavit doesn't seek the right to search all persons for those reasons, though, does it?

A. It seeks the right to search all persons based on the total information contained in the affidavit.

Q. The reference to persons immediately above your signature on the affidavit states, does it not, James Marks, Grover Marks and any other person on the premises at the time of warrant execution for officer safety. Do you see that?

A. Yes, sir, I do.

Q. Is it your testimony that you intended at the time you submitted that affidavit to Judge Tanksley to search all persons on the premises for things other than any potential officer safety concerns?

A. That is the first concern also in my mind at the time, was the possibility that other property could be secreted on the persons of people there at the residence.

Q. Did you advise Judge Tanksley that you intended to search all persons on the premises for reasons other than officer safety? I'm sorry, or that you sought the right to search persons other than Grover and Jimmy Marks for reasons other than officer safety?

A. I don't believe I specifically stated that to him, no.

****

Q. Is it not correct that the persons on the premises of Grover Marks' house were all searched for possession of items of property, jewelry or other items at the commencement of the search?

A. They were searched and these other items were located during that search. The warrant stated that we could search all persons on the property and they were searched. During those searches certain items were located and seized.

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Q. Had any of them read the warrants to your knowledge other than you that were in Grover Marks' house during the search operation?
A. Not to my knowledge.

****

Q. (BY MR. THOMSON) Did any members of the search party advise you as to what they were looking for?

A. Advise me what they were looking for?

Q. Yes. Or were they just searching? Did anybody indicate to you what specifically they were looking for if anything?

A. Nobody indicated to me specifically what they were looking for.

* * * * * * * *

Q. Did you know what had been covered in the briefing prior to that?

A. My understanding was that the other members of the task force had briefed people that we were looking for the articles and basically what would be enumerated in the search warrant.

Q. Tell me in more detail if you can what you understood the briefing indicated the search party members should be looking for.

A. I was not at either of the briefings, so I don't know exactly how it was explained.

Q. What was your understanding at the time you arrived as to what, if anything, they were looking for, the search party members were looking for?

MR. NEAL: Asked and answered.

Q. (BY MR. THOMSON) If you have any understanding. You may not.

A. Like I say, I was not at any of the briefings. I don't know how it was explained. The articles we were looking for were the ones in the search warrant.

****

Q. Were you asked specifically by anybody conducting the search at Grover Marks' house whether any specific item was included in the search warrant?

A. I don't recall any specific questions about specific articles.

Q. Were you responsible as case manager for reviewing all items that were seized prior to their being removed from Grover Marks' house?

A. Due to the large amount of articles, the individual officers who had seizedand inventoried the articles basically had kept their own lists or inventories. At that point we didn't have the opportunity to complete a complete inventory.

Q. My question was, was there any one person in the house who was reviewing the items that had been seized to determine whether they should be removed from the premises, any one person who had that responsibility? Maybe you've answered that question, but that was my direction.

A. One person didn't go through all the items. Each individual did their inventory and then the items were collectively taken and, like I say, there was no one person who was trying to compile everything.

Q. Or review everything to see if it should be removed, correct?

A. No, nobody went over every officer's items to my knowledge to see if that particular item should be removed.

Q. Any items that you reviewed would have been items you personally searched for?

A. Right, the ones that I was personally involved in searching for and seizing, and I don't recall any other--I didn't do anybody else's that I recall right offhand.

****

Q. Or Jimmy Marks, any information outside of your affidavit for searching and seizing any items from Jimmy Marks?

A. I didn't do, conduct all these searches. As far as providing the information, there was no information other than this contained in my affidavit as the basis for the search of those persons. However, I did not conduct all those searches.

****

Q. Who was responsible for directing a search of them?

A. It was basically a group of people went with the males, Detective Coker went with the females. There was really no one directing an individual to search an individual. We all knew the general search to be done and

there didn't have to be a lot of specific direction, one person to another.

****

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GYPSY CHURCH OF THE NORTHWEST, et al.,	)	NO.C-89-425-RJM
	)	C-89-423-RJM
Plaintiffs,	)	
	)	AFFIDAVIT OF
vs.	)	DENISE E.COKER
	)	
SPOKANE COUNTY, et al.,	)	
	)	
Defendants.	)	

STATE OF WASHINGTON :
:ss.
County of Spokane :

Denise E. Coker, being first duly sworn upon oath deposes and says:

I am one of the defendants in this suit. I state the following based upon my personal knowledge and experience.

I am a police office for the city of Spokane. I currently hold the rank of Detective and am assigned as an investigator in the crimes against persons unit.

I was hired by the City as a police officer on July l, 1973. I have attended numerous law enforcement training programs conducted by the Spokane Police Department and other law enforcement agencies. Attachment "A" contains a list of many of those training programs.

On June 18, 1986 I was assigned to the Case Screening Unit. I was contacted at that time by a member of the Burglary Task Force who asked if I would be available to assist in executing search warrants that they anticipated getting later that day. I attended a briefing at around 12:00 noon in the training room at the Public Safety Building where Lt. Freeman and one or two other officers described the background of the investigation they had been conducting and explained the operation they planned for the afternoon. We were told that the Burglary Task Force had been engaged in an investigation of a fencing operation involving two addresses, South 428 Thor and South 802 Thor. We were informed that they were in the process of seeking search warrants for the two houses, and that we would be looking for items such as jewelry, silverware, and other items which had been stolen. We were told who the case managers were, (the detectives that were in charge of the particular investigation), as well as who the various commanders would be. I believe Sgt. Earl Ennis was the Field Supervisor, and that Det. Andrew Pavlischak would be the Tactical Operations Commander. I was informed that my main role would be to search any females or children present at the scene.

****

57. The "pre-search briefing" occurred hours before the warrant had been prepared, and gave the searching officers even less detail, and broader discretion, than the soon-to-be prepared overbroad, facially invalid warrant. As Detective Neumiller so succinctly testified at his deposition:

> A. I gave a little bit of the background briefing, and explained what we would be looking for. And then met out at 4th and Freya.
>
> Q. For a minute let's stay back at the police station. What items were you looking for?
>
> A. We were looking for items taken in residential home burglaries.
>
> Q. Okay. Did you read off of any documents to say specifically what you were looking for?
>
> A. Not at that time, no.
>
> Q. Okay. Did you have any hand written or typewritten notes that you were referring to?
>
> A. No, I did not. [Emphasis added]

App. B-15

See February 6, 1992 Deposition of Jack Neumiller, at pp. 60-62.

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Q. But you were instructed to do the body searches that you did?

A. I wasn't--

Q. You were instructed to do that?

A. Yes.

Q. Do you know who instructed you to do that?

A. No.

Q. What were you looking for?

A. I was just instructed to remove all jewelry items.

Q. And there was no identification, that you know of, that was made while you were in the house at 428, of any of the items that were seized from the women or children, that were stolen?

A. Not that I know of.

****

****

Q. After you arrived at 428 South Thor and identified Grover Marks, gave him a copy of the warrant, as you say, and then advised him of his constitutional rights, did you give the warrant to any officer that was at the house to read?

A. No, sir, I did not.

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On 6-18-86 I was requested to assist in the execution of a search warrant @ S. 428 Thor @ 1445 hrs.

Body searches were conducted on the following individuals: Marie Marks dob 5-5-22; Jane Marks dob 5-6-67; Laura Zeko dob 6-21-51; Margert Marks dob 7-20-59; Sonny Marks dob 11-3-85; Steven Mars dob 12-24-84; Steve Marks dob 10-8-75; Richard Marks dob 9-4-74; Robert Marks dob 4-13-75; Eric Marks dob 9-5-80; Jason Marks 10-3-77 and Crissie Marks dob 3-23-80. All the jewelry worn by the females was seized & later placed on P # 39479 (refer to property sheet itemizing jewelry items).

****